

A

KGL REALTY SDN BHD & ANOR

v.

ASAS DUNIA BHD & OTHER CASES

B

HIGH COURT MALAYA, PENANG
CHEW SOO HO JC
[CIVIL SUITS NOS: 22-322-2000, 22-323-2000
& 22-324-2000]
9 NOVEMBER 2009

C

CONTRACT: *Assignment - Absolute assignment - Deed of assignment requiring consent in writing of assignee before assignor enforces rights or remedies - Consent in writing not obtained by assignor when terminating contract with third party - Actions and conduct of assignee evincing unequivocal consent - Whether open to third party to complain of lack of*

D

written consent

CONTRACT: *Assignment - Absolute assignment - Whether assignment consistent with a charge under s. 4(3) of the Civil Law Act 1956 - Whether absolute assignment included the assignment of legal rights to enforce remedies - Whether assignor had locus standi to enforce remedies personally - Civil Law Act 1956, s. 4(3)*

E

CONTRACT: *Privity - Building contract - Sale and purchase agreement executed by purchaser and developer in respect of development over third party's land - Rights and obligations under agreement to be performed by purchaser and developer - Third party merely giving consent to purchaser's assignment of rights and interests to financier - Whether purchaser ought to add third party in action against developer for late delivery*

F

G

CONTRACT: *Rescission - Building contract - Time of the essence - Late delivery of vacant possession of property by developer - Whether developer had breached fundamental term of the contract - Whether contract voidable at purchaser's option - Whether purchaser obliged to wait for a reasonable time before rescinding contract - Whether public policy reasons a bar to rescission - Contracts Act 1950, s. 56(1)*

H

CONTRACT: *Rescission - Compensation - Compensation for damage sustained - Whether refund of moneys paid to be construed as compensation - Contracts Act 1950, s. 76*

I

WORDS & PHRASES: *'absolute assignment' - Civil Law Act 1956, s. 4(3)*

The defendant developer entered into a JVA with the landowner to develop its lands into a commercial project. The first plaintiffs entered into 12 separate Sales and Purchase Agreements ('SPAs') with the defendant and the landowner to purchase 12 units in the project. Clause 6.08 of the SPAs provided for the defendant to complete the deliver vacant possession of the units within three years from the date of the respective SPAs. Clause 7.14 of the SPAs provided that time was to be of the essence. The first plaintiffs obtained financing for their purchases from the second plaintiff bank through the execution of several Loan-Agreement-cum-Assignments ('LACAs'), with the consent of the defendant and the landowner. Under clause 13.01 of the LACAs, the first plaintiffs assigned to the second plaintiff, all their rights, titles and interests in the SPAs and the properties. However, clause 13.01 was silent on the assignment of 'enforcement remedies' to the second plaintiff. Clause 14.01 of the LACAs expressly excused the second plaintiff from all obligations and liabilities under the SPAs, including the enforcement of remedies. Further, the said clause imposed upon the first plaintiffs the duty to perform all conditions and obligations, including the filing of claims and other action to enforce the SPAs. Clause 15.01(c) of the LACAs further contained covenants on the part of the first plaintiffs to not terminate the SPAs without the second plaintiff's prior consent in writing. The defendant failed to complete and deliver the units within the stipulated time. The first plaintiffs thus rescinded the SPAs and sought the return of all moneys paid, damages and costs. The defendant raised several ground in contesting the first plaintiffs' actions.

Held (allowing the claims with costs):

- (1) After considering the whole LACA, in particular clauses 13.01, 14.01 and 15.01(c)(i) therein, the intention of the parties was explicit that the enforcement of the terms of the SPA would be vested in the hands of the first plaintiffs and not with the second plaintiff, which would only be obligated to progressively release the financing facilities as stipulated in Part I of the LACAs. The words 'absolute assignment' and 'absolutely assigns' in clause 13.01 of the LACAs excluded the second plaintiff's rights to enforce all remedies under the SPAs. The LACAs in the instant case were consistent with a charge within the meaning of s. 4(3) of the Civil Law Act 1956, thereby conferring the first plaintiffs with the *locus standi* to bring the claims against the defendant. *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* (FC) (dist); *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* SC (dist); *Kredin Sdn Bhd v. YTF Investments Sdn Bhd* CA (dist). (paras 9-15)

- A (2) On the facts, there was consent given to the first plaintiffs to terminate the SPAs by the second plaintiff, though not in writing. However, the defendant could not complain since the LACAs were contracts between the first plaintiffs and the second plaintiff. The defendant was not privy to these contracts.
- B The second plaintiff's stopping of further releases of the 1st plaintiff's credit facilities to the defendant after the termination of the SPAs was also consistent with the second plaintiff's consent to the rescission of the SPAs. Further, the second plaintiff's joining action with the first plaintiffs in the suits against the defendant constituted unequivocal consent. (para 16)
- C
- D (3) Public policy does not arise in cases where the contractual obligation requires the developer to complete the project within the stipulated and agreed time frame and not to breach the contract in law. Public policy would dictate parties comply with their obligations under the law. (para 17)
- E (4) In the instant case, time was clearly of the essence as prescribed by clause 7.14 of the SPAs and a fundamental term of the SPAs. Clause 6.08 of the SPAs which provided for the completion date within three years from the SPAs was thus a fundamental term, the breach of which constituted a serious breach. Section 56(1) of the Contracts Act 1950 was applicable in the circumstances and rendered the SPA voidable at the option of the first plaintiffs. The plaintiffs were thus entitled under s. 56(1) of the Contracts Act 1950 to rescind the SPA when the defendant breached the fundamental terms of the contract in clause 6.08 and 7.14 of the SPAs. There was no requirement under s. 56(1) of the Contracts Act 1950 for the plaintiffs to wait a reasonable time before terminating the SPAs. *Yeow Kim Pong Realty Ltd. v. Ng Kim Pong* (foll); *Sim Chio Huat v. Wong Ted Fui* (foll). (para 18-25)
- F
- G
- H (5) The failure to add the landowner as a party was not fatal to the plaintiffs' claims. The breaches of clause 6.08 read with 7.14 of the SPAs was by the defendant as vendor. The landowner had merely allowed its land to be built upon. Its role in the LACAs was merely to give consent. It was not privy to the LACAs. All the material terms, conditions, covenants and obligations contained in the SPAs were stipulated and contracted to be performed between the defendant as the vendor and the first plaintiffs as the purchaser. The plaintiffs could sue the defendant and not the landowner pursuant to the said SPAs. In
- I

any event if the defendant alleged that the landowner was jointly liable, there was nothing to bar the defendant from taking a 3rd party proceedings against the landowner. The Strata Titles Act 1985 was not relevant to the issues in the instant case. (para 26)

- (6) There was no need for a separate date to assess damages. The plaintiffs had pleaded and proved the moneys they had paid and incurred for which they suffered as a consequence of the defendant's breach of the SPA. The defendant had not challenged those payments made or incurred. The refund of all moneys paid is construed as compensation under s. 76 Contracts Act 1950. (paras 27 & 28)

Case(s) referred to:

Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd [1988] 1 LNS 213 HC (*refd*)

Gan Hwa Kian & Anor v. Shencourt Sdn Bhd [2007] 3 CLJ 538 HC (*refd*)
Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41 SC (*dist*)

Hoening v. Issacs [26 June 1952] All ER 176 (*refd*)

Kredin Sdn Bhd v. YTF Investments Sdn Bhd [1998] 1 CLJ 205 CA (*dist*)
Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC (*dist*)

Sapiahtoon v. Lim Siew Hui [1963] 1 LNS 118 HC (*refd*)

Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC (*fol*)

Stocznia Gdanske SA v. Latvian Shipping Co and Others [1998] 1 All ER 883 (*refd*)

Thomas Iruthayam & Anor v. LSSC Development Sdn Bhd [2005] 6 CLJ 141 HC (*refd*)

Xavier Kang Yoon Mook v. Insun Development Sdn Bhd [1995] 2 CLJ 471 HC (*refd*)

Yeow Kim Pong Realty Ltd v. Ng Kim Pong [1961] 1 LNS 157 PC (*fol*)

Legislation referred to:

Civil Law Act 1956, s. 4(3)

Contracts Act 1950, ss. 56(1), 76

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, 1974, vol 9, p 370, para 538

For the plaintiffs - *Tan Lan Eing (Choo Ee Lin with him)*; *M/s JB Lim & Assocs*
 For the defendant - *M Thayalan*; *M/s Thayalan & Assocs*

Reported by Andrew Christopher Simon

A JUDGMENT

Chew Soo Ho JC:

Introduction

B [1] These three civil suits are tried jointly upon the request and
consent by the parties herein on ground that all the three suits
involved the same parties: KGL Realty Sdn Bhd (1st plaintiff in CS
22-322-2000) and TSL Properties Sdn Bhd (1st plaintiff in CS 22-
323-2000 and CS 22-324-2000) (hereinafter referred to collectively as
C “the 1st plaintiffs”) are companies where all the shareholders are the
same, the subject matter is the same in that the 1st plaintiffs in all
three suits had purchased a total of 12 parcels of commercial units
in the same property development of the defendant known as Asas
Parade and the 2nd plaintiff or the initial Hock Hua Bank that
D subsequently merged with the 2nd plaintiff was the bank which
provided the credit facilities to all the 1st plaintiffs for the purchase
of the 12 parcels of the said lots in Asas Parade; the witnesses are
also the same.

Facts Of The Case

E [2] Pursuant to a joint venture agreement dated 3 May 1995
between the defendant and Dynor Resources Sdn Bhd, the
landowner, the defendant as developer was allowed to develop the
lands of the landowner into a commercial project known as Asas
Parade and to sell the parcels comprised in the buildings to be
F erected to purchasers. The 1st plaintiffs had entered into 12 Sales
& Purchase Agreements (SPA) with the defendant as vendor and
the landowner to buy 12 parcels of the commercial units in the said
Asas Parade to be constructed by the defendant as follows:

G

No.	SPA	Parcel	Purchase Price (RM)
1	SPA dated 15.4.1996	No. 5 1st Floor	196,000.00
H 2	SPA dated 15.4.1996	No. 6 1st Floor	272,000.00
3	SPA dated 14.3.1996	No. 30 Ground Floor	223,000.00
4	SPA dated 6.2.1996	No. 31 Ground Floor	223,000.00
I 5	SPA dated 6.2.1996	No. 3 Ground Floor	295,000.00
6	SPA dated 6.2.1996	No. 4 Ground Floor	296,000.00

7	SPA dated 6.2.1996	No. 29 Ground Floor	298,000.00
8	SPA dated 14.3.1996	No. 63 Ground Floor	201,000.00
9	SPA dated 6.2.1996	No. 64 Ground Floor	201,000.00
10	SPA dated 14.3.1996	No. 149 Ground Floor	184,000.00
11	SPA dated 6.2.1996	No. 150 Ground Floor	184,000.00
12	SPA dated 14.3.1996	No. 165 Ground Floor	394,000.00

[3] Although the landowner was a party in the aforesaid SPA, all the material terms, conditions, covenants and obligations contained in aforesaid SPA of the said parcels were stipulated and contracted to be performed between the defendant as vendor and the 1st plaintiffs as purchasers.

[4] By a loan agreement cum assignment (LACA) dated 7 December 1996 (CS No: 22-322-2000) (the LACA in the other two suits contained the same clauses), the 1st plaintiffs, with the consent of the defendant as vendor of the aforesaid parcels and the landowner, had assigned all the 1st plaintiffs' rights, title and interest in respect of the SPA and the parcels purchased to the then Hock Hua Bank Berhad, now the 2nd plaintiff, by way of security for banking facilities in a principal amount of RM731,200 (term loan of RM431,200 and overdraft of RM300,000 with interest at 1.75% per annum above base lending rate) (in Suit No: 22-322-2000); RM820,000 (Overdraft with interest at 1.75% per annum above base lending rate) (in Suit No: 22-323-2000) and RM820,000 (Term load at 1.75% per annum above base lending rate) (in Suit No: 22-324-2000) granted by the bank to the 1st plaintiffs to part finance the payment of the purchase price for each of the respective parcels under each respective SPA.

[5] Pursuant to clause section 6.08 of the respective SPA which provides that the defendant shall effect the completion of the subject parcels within a period of three (3) years from the date of the respective agreements, the defendant did not complete and deliver vacant possession by the completion date as provided of all the aforesaid parcels purchased by the 1st plaintiffs. By reason of the said breach, the 1st plaintiffs with the consent of the 2nd plaintiff rescinded the SPA *vide* notices of termination dated 23 June 1999 and demanded from the defendant the refund of all monies paid by the 1st plaintiffs and by the 2nd plaintiff on behalf of the 1st plaintiffs with interest and solicitors' costs as damages.

- A **[6]** The defendant conceded that the respective parcels in the Asas Parade purchased by the 1st plaintiffs in these suits were not completed within the three years period. The defendant contended that the SPA clearly provided for indemnity at the rate of 10% per annum of the purchase price calculated from day to day
- B commencing immediately after the date fixed for completion if the property was not delivered after the completion date as stipulated in section 7.19 in the respective SPA and the defendant was prepared to pay them. Defendant did not accept or agree to the said rescission. In addition, the project was not abandoned though
- C progressing very slowly. 1st plaintiffs had bought a total of 21 parcels out of the 80 parcels in Asas Parade but they rescinded 12 SPAs in these three suits but not the rest. Defendant contended that 1st plaintiffs' conduct was inconsistent and the rescission also affected other purchasers who wanted to complete the agreements. By rescinding the SPA, 1st plaintiffs could force the defendant to
- D abandon the project. However, although the defendant was suffering great losses, they completed the project and obtained the certificate of fitness for occupation on 28 October 2009.

Issues Raised

- E **[7]** The court has deduced the issues raised by both parties to the following:
- F 1. Whether the 1st plaintiffs have the right in law or under the SPA to rescind the said SPA on 23 June 1999?
- F 2. Whether the termination notices issued by the 1st plaintiffs to the defendant were valid and in compliance with section 15.01(c)(i) of the Loan Agreement Cum Assignment (LACA) between Hock Hua Bank and the 1st plaintiffs?
- G 3. Whether the defendant was also able to fulfill their obligations under the SPA?
- G 4. Whether the failure to name the Lndowner, Dynner Resources Sdn Bhd as a party in the suits is fatal to the plaintiff cases?
- H 5. Whether the plaintiffs are entitled to the relief sought?

Evaluation & Findings

- I **[8]** The facts of these three cases are basically not disputed that the 1st plaintiffs had bought for the purposes of these three cases 12 parcels of commercial lots in Asas Parade, a complex developed

by the defendant on the Dyners Resources Sdn Bhd's (the landowner's) lands. The respective dates of purchase, the number of parcels, the prices of the parcels and the execution of the SPA as listed above are not in dispute. The issues in contention by both parties are ostensibly questions of law for the determination of this court. From the deduced five issues above, this court will deal with the 1st and 2nd issues together as they are intertwined.

1st Issue: Whether The 1st Plaintiffs Had The Right To Rescind The Contracts; And

2nd Issue: Whether The 1st Plaintiffs Had The Capacity To Issue The Notices Of Rescission And Henceforth Whether The Said Notices Were Valid

[9] The defendant contended that by the Loan Agreement Cum Assignment (LACA) (exh. P2 in Civil Suit No: 22-322-2000; LACA for the other two suits contained the same clauses), the 1st plaintiffs had, *vide* section 13 therein, assigned their rights, titles to and interest in the properties to the bank absolutely. Therefore, defendant argued that 1st plaintiffs had no *locus standi* to issue the rescission notices since the assignment was absolute; it should be the bank which had the capacity to pursue its action against the defendant. In support, defendant cited the Federal Court case of *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231, *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41 SC and *Kredin Sdn Bhd v. YTF Investments Sdn Bhd* [1998] 1 CLJ 205 CA which held, *inter alia*, that if the deed was an absolute assignment and not purporting to be by way of charge only within the meaning of s. 4(3) of the Civil Law Act 1956, the assignee should have all the rights, title and interest of the assignor in the SPA. Hence, the defendant contended that it should be the bank who would be entitled to institute the action to enforce the agreements against the defendant and not the 1st plaintiffs. In *Nouvau Mont Dor (supra)* which was followed by *Hipparion* and *Kredin (supra)*, His Lordship Seah FJ in delivering the judgment of the Federal Court said:

It is plain that in every case of this kind, all the terms of the instrument must be considered; and *whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor*. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within section 25 and the action must be brought in the name of the assignee (Mathew LJ in *Hughes v. Pump House Hotel Co. Ltd. (supra)*). (emphasis added)

- A [10] From the above statement of law of the Federal Court, the consideration must be on the whole instrument and not just a clause within the instrument. In *Nouvau Mont Dor* and *Hipparion* (*supra*), the pertinent clause or term of the assignment reads as follows:
- B That in consideration of the Bank having agreed to grant the loan the assignor as beneficial owner hereby assigns absolutely to the Bank all his rights title and interest in and to the said property and under the said Sales Agreement and the full benefit granted thereby and all stipulations therein contained **and all remedies for enforcing the**
- C **same.** (emphasis added)
- D [11] Basing on the above term of the agreements in *Nouvau Mont Dor* and *Hipparion*, the Federal Court and Supreme Court respectively held that the deed was an absolute assignment and that the bank as assignee should enforce the action. Similarly, in *Kredin* (*supra*), the Court of Appeal reiterated the same principle of law that if at all there was a cause of action to institute the action to enforce the agreement, it would be the bank who would be entitled to do so and not *Kredin* as clause 1 of the deed of assignment therein made this clear when together with its rights, title and
- E interest, *Kredin* also assigned ‘all remedies for enforcing’ to the bank. In brief, in all the three cases cited, the term of the deed expressly stated that the borrower assigned all remedies for enforcing to the bank. In the instant cases before this court, section 13.01 provides:
- F In consideration of the Facility granted to the Borrower upon the terms and conditions contained in this Agreement, the Borrower as beneficial owner hereby absolutely assigns all of the Borrower’s rights and title to and interest whatsoever in the Property including all rights and interest of the Borrower in the Sale and Purchase Agreement to the Bank.
- G [12] From this term in the Loan Agreement cum Assignment (LACA), it is undoubted that the bank was not assigned the rights to enforce all remedies as in the three authorities quoted by the defendant above. Section 13.01 is totally silent on this right. Indeed, the bank had divested itself from all obligations or liabilities
- H under the SPA including the enforcement of all remedies but to confine itself to making progress payments out of the facilities granted under the LACA while the 1st plaintiffs were to remain liable under the SPA to observe and perform all of the conditions and obligations therein including filing of any claim or taking any
- I other action to enforce the terms of the SPA. This can be seen in section 14.01 therein as follows:

It is expressly agreed, however, that notwithstanding anything contained herein to the contrary, the Borrower shall remain liable under the Sale and Purchase Agreement to observe and perform all of the conditions and obligations therein provided to be observed and performed by him, and the Bank shall have no obligation or liability under the Sale and Purchase Agreement by reasons of or arising out of this Assignment, nor shall the Bank be required or obligated in any manner to observe or perform any of the conditions or obligations of the Borrower under or pursuant to the Sale and Purchase Agreement (*except to make progress releases out of the proceeds of the Facility under the terms and conditions provided in Part I of this Agreement*) or to present or file any claim, or to take any other action to enforce the terms of the Sale and Purchase Agreement. (emphasis added)

A

B

C

[13] The covenants in section 15.01(c) in the same LACA further strengthen the fact that the right to terminate the SPA was on the 1st plaintiffs; that was why they could covenant to have prior consent of the bank in writing before they exercised their right to terminate the SPA. Section 15.01(c) reads:

D

The Borrower hereby covenants with the Bank that he:

(c) will not without the prior consent of the Bank in writing,

(i) terminate or agree to terminate the Sale and Purchase Agreement;

E

...

[14] It is obvious that the 1st plaintiffs as borrowers had been given that right to terminate or to enforce the SPA as expressed in section 14.01 to be notwithstanding anything contained in the LACA to the contrary which undoubtedly referred to section 13.01 thereby qualifying the absolute assignment as provided in section 13.01. This is further consistent with the fact that the 1st plaintiffs were able to covenant with the bank not to terminate the SPA without the prior written consent of the bank as in clause section 15.01(c)(i). It is through the rights conferred upon the 1st plaintiffs *vide* section 14.01 that they were able to so covenant not to terminate the SPA without the written consent of the bank, the 2nd plaintiff, *vide* section 15.01(c)(i).

F

G

H

[15] After due consideration of the whole LACA and in particular the terms under section 13.01, 14.01 and 15.01(c)(i) therein, this court finds that the intention of the parties was explicit in that the enforcement of the terms of the SPA would be vested in the hands of the 1st plaintiffs and not with the bank which would only be

I

- A obligated to make progress releases of the proceeds of the facilities under the terms and conditions provided in Part I of the LACA as manifested in clause section 14.01 above. In the circumstances, this court holds that the term in section 13.01, though with the caption of ‘absolute assignment’ and the words ‘absolutely assigns’, differs
- B from the term expressed in *Nouvau Mont Dor*, *Happarion* and *Kredin (supra)* as this particular clause specifically or intentionally excluded the bank’s absolute rights to enforce all remedies under the SPA. The LACA in the instant cases are therefore consistent with a charge as provided in clause 7.01 within the meaning of s. 4(3) of
- C the Civil Law Act 1956. Following *Nouvau Mont Dor*, if on the consideration of the whole instrument, it is clear that the intention was to give a charge only as in these instant cases, then the action must be in the name of the assignor. Consequently, the 1st plaintiffs as assignors had the *locus standi* to file these suits against the defendant.
- D
- E **[16]** On section 15.01(c)(i) in the LACA, defendant contended that there was no consent in writing being produced to establish that this term had been complied with by the 1st and 2nd plaintiffs. From the evidence before this court, PW1, the 2nd plaintiff’s Manager, and PW2, the Director of the 1st plaintiffs, had testified that the 2nd plaintiff had given the consent, though not in writing, to the 1st plaintiffs to terminate the SPA. Learned counsel for the plaintiffs submitted that there is no cause for the defendant to complain as the LACA were contracts between the 1st plaintiffs and
- F the 2nd plaintiff and defendant was not privy to these contracts. Parties to the contract could agree to waive the requirement of consent in writing as in these three cases where oral consent was given by the 2nd plaintiff to the 1st plaintiffs. Learned counsel further submitted that the conduct of the 2nd plaintiff in stopping
- G all releases of the 1st plaintiffs’ credit facilities towards any payment to the defendant in relation to the aforesaid SPA after the termination of the said SPA, was consistent with the 2nd plaintiff having given their consent to the 1st plaintiffs’ rescission of the SPA. This court finds merit in this submission. This fact is indeed further strengthened by the 2nd plaintiff joining action with the 1st
- H plaintiffs to be a party in these suits against the defendant. Consent from the 2nd plaintiff to the 1st plaintiffs to terminate the SPA and further action is unequivocal.

I

[17] Having determined the capacity of the 1st plaintiffs, the ensuing question is whether the 1st plaintiffs could terminate the SPA in these cases. The defendant submitted that the 1st plaintiffs could not rescind unless it was for serious breach citing *Treitel The Law of Contract*, 10th edn 1999, *Stocznia Gdanske SA v. Latvian Shipping Co and Others* [1998] 1 All ER 883 (HL), *Hoening v. Issacs* [26 June 1952] All ER 176 (CA) and *Sapiahtoon v. Lim Siew Hui* [1963] 1 LNS 118. It is a fact that pursuant to the clause under section 6.08 of the SPA, the date of completion of the premises purchased by the 1st plaintiffs shall be within three (3) years from the date of the SPA as listed above and that the defendant had failed to comply with this term. This fact is undisputed. The same section 6.08 also provided the situations where the defendant was not liable for any delay, that is, when the delay was occasioned by strike or combination of workmen, lock-out, civil commotion, force majeure, exceptionally inclement weather, loss or damage by fire, flood or tempest or other like cause beyond the defendant's control. However, the defendant had never claimed the delay in these cases to be occasioned by any of the above reasons. What the defendant had contended was that it was due to economic downturn which caused the delay. This ground was not contracted to be one of the grounds which justified the defendant's delay to complete the premises within three years in section 6.08 above. The defendant further submitted that 1st plaintiffs should not have terminated the SPA because section 7.19 in the SPA had provided indemnity for the delay in completion; termination of the SPA in the light of section 7.19 would have forced the defendant to abandon the project. They also argued that it is against public policy for the 1st plaintiffs to have terminated the SPA as such termination would have affected other purchasers who wanted to have the building completed. This argument is in fact not true as the fact in these instant cases showed that in spite of the termination of the SPA by the 1st plaintiffs, the defendant did not abandon the project but proceeded to build *albeit* very slowly and complete the buildings in 2001 with the certificate of fitness for occupation obtained on 28 October 2009. They had not been forced to abandon the project even after the 1st plaintiffs had rescinded the SPA. On the question of public policy, this court is of the view that the question of public policy does not arise in these cases where the contractual obligation required the developer to complete the project within the stipulated and agreed time frame and not to breach the contract in law. Public policy would dictate parties to comply with their obligations under the law. Defendant cannot be allowed to hide in

- A the cocoon of public policy to defeat the claims of the plaintiffs when the defendant had themselves breached section 6.08 of the SPA. If at all the interests of the other purchasers were affected whether adversely or otherwise, it would be the default of the defendant in the performance of their obligations under the SPA
- B and not the fault of the 1st plaintiffs. It would therefore be unjust for the defendant to attach any blame on the 1st plaintiffs.

[18] Section 7.14 in the SPA provided as follows:

- C Time wherever mentioned in this Agreement shall be of the essence of this contract.

- D **[19]** Defendant through the evidence of their witness SD1 had categorically admitted this clause to be a fundamental term in the SPA. On this admission, plaintiffs submitted that they were entitled to rescind or terminate the SPA pursuant to s. 56(1) of the Contracts Act 1950 and claim damages when the defendant had failed to complete the premises within the three years as stipulated in section 6.08 in the said SPA. Plaintiffs cited *Halsbury's Laws of England*, 4th edn, 1974, vol 9, p 370 para 538 where it laid down the general rule that "where one party to a contract has committed a serious breach by a defective performance or by repudiating his obligations under the contract, the innocent party will have the right to rescind the contract; that is to treat himself as discharged from the obligation to tender further performance, and to sue for damages for any loss he may have suffered as a result of the breach. The breach itself does not terminate the contract, the innocent party having the right to elect to treat the contract as continuing or to terminate it by rescission." Plaintiffs also cited *Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd* [1989] 1 LNS 213, *Xavier Kang Yoon Mook v. Insun Development Sdn Bhd* [1995] 2 CLJ 471, *Gan Hwa Kian & Anor v. Shencourt Sdn Bhd* [2007] 3 CLJ 538 and *Thomas Iruthayam & Anor v. LSSC Development Sdn Bhd* [2005] 6 CLJ 141 in relation to the application of s. 56(1) Contracts Act 1950. When time is of the essence of the contract to be a fundamental term of the SPA as admitted by the defendant, clause section 6.08 which provided for the completion date within three years from the dates of the SPA must be taken as a fundamental term. The breach of a fundamental term of a contract must be construed to be a serious breach; see *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 (*infra*). This court therefore finds no necessity to discuss the text and authorities on this point as submitted above by the defendant.
- I

[20] Section 56(1) of the Contracts Act 1950 provides:

A

56. (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

B

[21] This court finds that s. 56(1) Contracts Act 1950 is applicable in the circumstances of these cases before this court and it renders the SPA voidable at the option of the 1st plaintiffs. Indeed, the rules contained in s. 56 of the Contracts Act 1950 are not different from the position arrived at in common law. In *Yeow Kim Pong Realty Ltd. v. Ng Kim Pong* [1961] 1 LNS 157, the position is that if in a contract in which time is of the essence, a party fails to perform it by the stipulated time, the innocent party has the right to rescind the contract, or to treat it as still subsisting. In *Sim Chio Huat v. Wong Ted Fui (supra)* the Federal Court held, *inter alia*, as follows:

C

D

Held: (1) in this case as time was provided to be of the essence of the agreement, the stipulated periods within which the houses had to be delivered to the respondent became an essential condition of the agreement. Failure by the appellant to fulfill this condition entitled the respondent to have an option of treating the agreement either (a) as having been repudiated and dismissing the appellant or (b) as still continuing. ...

E

[22] This principle of law is clearly envisaged in s. 56(1) Contracts Act 1950 as well as common law disregarding whatever facts of the case may be.

F

[23] On the existence of an indemnity clause, section 7.19 in the SPA for which the defendant agreed to pay the liquidated damages, this court would like to echo what has been held in *Gan Hwa Kian & Anor v. Shencourt Sdn Bhd (supra)* where His Lordship Abdul Malik Ishak J (as he then was) held as follows:

G

... The plaintiffs' entitlement to liquidated damages did not take away their right to rescind. Further, time was not waived by the plaintiffs and the defendant did not give any credible assurances as to when the subject property would be completed.

H

[24] For the reasons deliberated above, this court holds that the plaintiffs are entitled under s. 56(1) Contracts Act 1950 to rescind the SPA when the defendant had breached the fundamental terms of the contract in section 6.08 read with section 7.14 of the said SPA.

I

- A [25] In view of the aforesaid findings of this court, the 3rd issue of whether the defendant was able to fulfill their obligations under the SPA, to this court, is non issue when the breach of section 6.08 read with section 7.14 had occurred. This court finds that there is no duty for the plaintiffs to wait for any time longer than necessary once they have elected to treat the contracts as void. This court does not agree with the defendant's argument that the plaintiffs would have to wait for a reasonable time after the due dates for completion of the premises before they could exercise their rights to rescind the SPA. There is no such requirement within s. 56(1) Contracts Act 1950 that the plaintiffs must wait for a reasonable time before they could terminate the contracts. The option is with the plaintiffs and once they had decided to terminate the SPA after the completion date when the defendant could not fulfill ie, the occurrence of the breach, the plaintiffs would be entitled to terminate the SPA as time was of the essence of the contract. The defendant knew and ought to have realized that when they agree to complete the premises within the stipulated three years, that was the maximum time allotted to them and that they must complete by that time frame. The fact that the SPA do not contain the extension of time clause coupled with the fact that section 7.14 provided that time is the essence of the contract make it affirmative that the defendant must complete within the given time and no more. Hence, the contention that reasonable time ought to have been given by the plaintiffs to the defendant after the expiration of the completion date before they rescind the SPA holds no merit. Moral consideration must be distinguished from the legal obligation and legal right of the parties. In addition, there was no evidence from the defendant to the plaintiffs at the material time that they had given an assurance to the plaintiffs that they could complete at a stated time and asked for the consent of the plaintiffs to extend the time. Evidence showed that the defendant was in fact very slow in their work progress and only managed to obtain the certificate of fitness for occupation of the said premises on 28.10 2009, some ten (10) years after the completion dates of the 12 parcels purchased by the 1st plaintiffs. Even taking into consideration only of the practical completion of the said premises which the defendant alleged to be in 2001, it was still two (2) years after the completion dates. The breach had already been committed.
- G
- H
- I [26] Turning to the 4th issue of whether the failure to name the landowner as a party is fatal to the plaintiffs' cases, the defendant submitted that the landowner is a party to all the SPAs, all the assignments and under the Strata Titles Act 1985, all the

obligations are on the 'original proprietor' ie, the landowner. Therefore the landowner must be a party to all the SPAs. In these cases before this court, the breach of section 6.08 read with section 7.14 of the SPA was by the defendant as the "vendor" as vividly expressed in section 6.08. The completion of the premises in the SPA was solely the obligations of the defendant. The landowner merely allowed its lands to be built. Its role in the LACA was merely giving its consent for the assignment but was not privy to the contract. It is also implicit in the SPA that all the material terms, conditions, covenants and obligations contained therein were stipulated and contracted to be performed between the defendant as the vendor and the 1st plaintiffs as the purchaser. This court is of the view that in the circumstances, the plaintiffs could sue the defendant and not the landowner pursuant to the said SPA. In any event, if the defendant alleged that the landowner is jointly liable, there is nothing to bar the defendant from taking a 3rd party proceeding against the landowner. No such proceeding was taken out. The Strata Titles Act 1985 is not relevant to the issues before this court as the 1st plaintiffs had rescinded the contracts and it would not involve the question of the issuance, registration etc, of the strata titles. The role of the landowner pertaining to strata titles is premature.

A

B

C

D

E

5th Issue: Whether The Plaintiffs Are Entitled To The Relief Sought

[27] In submission, learned counsel for the plaintiffs submitted that the plaintiffs claimed from the defendant the monies paid by the plaintiffs towards the purchase price of the 12 parcels of the commercial units in Asas Parade amounting to RM685,500 and interest paid to the bank as at 30 June 2000 of RM134,802.31 (CS No: 22-322-2000), RM804,250 plus interest paid to the bank of RM147,537.31 (CS No: 22-323-2000) and RM656,200 plus interest paid to the bank of RM137,725.61 (CS No: 22-324-2000), interest on the total of the principal and interest sums at 10% per annum or at any rate this court shall deem fit from 1 July 2000 to the date 31 October 2009 of 112 months and the fees paid to the solicitors for the proceedings and other relief. Learned counsel for the defendant contended that what the plaintiffs are claiming are in fact for *restitutio in integrum* which they are not entitled but damages only pursuant to s. 76 of the Contracts Act 1950 which provides:

F

G

H

76. A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract.

I

A [28] Learned counsel for the defendant submitted there is a
distinction between restitution and damages and he prayed that a
date for assessment of damages should be fixed if the court were to
allow the plaintiffs' claims. Learned counsel for the plaintiffs
B asserted that the above-quoted claims represent the damages suffered
by the 1st plaintiffs. Having considered the arguments of both
parties, this court is of the view that even if the court were to allow
the plaintiffs' claim and schedule a date for the assessment of
damages, the plaintiffs would have put forward the same claims as
C asserted by the learned counsel for the plaintiffs. There is therefore
no necessity to do as requested by learned counsel for the
defendant. The plaintiffs have pleaded and proved those facts of the
monies that they had paid and incurred for which they suffered as
a consequence of the breach of the SPA by the defendant that they
had terminated and the fact that the defendant had not challenged
D those payments made or incurred by the 1st plaintiffs renders it
unconceivable that there should be another date to assess the
damages which are the same. In *Gan Hwa Kian & Anor v. Shencourt
Sdn Bhd (supra)*, the High Court held *inter alia* that "As the
defendant had breached its obligation under the agreement to
E deliver the property on time, the plaintiffs were entitled to the
refund of all the moneys paid and damages for the non-fulfillment
of the contract." It appears that the refund of all monies paid is
construed as compensation under s. 76 Contracts Act 1950. This
court will accordingly decide on this issue without having to adjourn
to another date for the assessment of damages.

F **Conclusion**

[29] Having considered all evidence and submissions by both
parties in these three suits, this court hereby orders judgment in
favour of the plaintiffs in the following:

G **1. Civil Suit No. 22-322-2000**

Paragraph 16 of the amended statement of claim:

Prayers (a), (b), (c) and (e) are allowed.

H Prayers (f) is allowed as amended as follows:

Payment of interests to accrue on the sum of RM685,500.00 at
the rate of 6% per annum from 23.6.1999, the date of rescission
to the date of judgment.

I

Prayer (g) is allowed as amended as follows:

A

Payment of RM11,213.35 being solicitors' fees, costs and expenses in the purchase and financing of the parcels.

2. Civil Suit No: 22-323-2000

Paragraph 16 of the amended statement of claim:

B

Prayers (a), (b), (c) and (e) are allowed.

Prayer (f) is allowed as amended as follows:

Payment of interest to accrue on the sum of RM804,250.00 at the rate of 6% per annum from 23.6.1999, the date of rescission to the date of judgment.

C

Prayer (g) is allowed as amended as follows:

Payment of RM4,000.00 being solicitors' fees, costs and expenses in the purchase and financing of the parcels.

D

3. Civil Suit No: 22-324-2000

Paragraph 16 of the amended statement of claim:

E

Prayers (a), (b), (c) and (e) are allowed.

Prayer (f) is allowed as amended as follows:

Payment of interest accrue on the sum of RM656,200.00 at the rate of 6% per annum from 23.6.1999, the date of rescission to the date of judgment.

F

Prayer (g) is allowed as amended as follows:

Payment of RM20,331.00 being solicitors' fees, costs and expenses in the purchase and financing of the parcels.

G

[30] It is further ordered that interest at the rate of 8% per annum to be payable on the respective sums of RM685,500, RM804,250 and RM656,200 in all the above three prayers (f) from the date of judgment to the date of realization.

H

[31] It is lastly ordered that costs of RM10,000 is awarded to the plaintiffs for all the three civil suits.

I